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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re E.W., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

E.W.,

Defendant and Appellant.

A120706

(City & County of San Francisco
Super. Ct. No. JWO86016)

E.W. appeals from a judgment declaring him to be a ward of the juvenile court based on the commission of sexual offenses upon a sleeping girl. He contends the court erred in sustaining an objection to a question put to a police officer on cross-examination, and that the prosecutor engaged in misconduct in overcharging the offense and in resisting transfer of the case to the county of his residence for the dispositional hearing. Finding no error, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The San Mateo County District Attorney filed a petition under Welfare and Institutions Code section 602 alleging that on March 9, 2007, E.W. committed sexual penetration by a foreign object (Pen. Code, § 289, subd. (d) (count 1)), attempted rape (Pen. Code, §§ 261, subd. (a)(4), 664 (count 2)), and misdemeanor sexual battery (Pen. Code, § 243.4, subd. (e)(1) (count 3)). Following a contested jurisdictional hearing, the court sustained counts 1 and 3 and granted the prosecution's motion to dismiss count 2.

The San Mateo court found that the maximum period of potential confinement is eight years four months and then transferred the case for disposition to the juvenile court in San Francisco, where E.W. resides. The San Francisco court declared E.W. to be a ward of the court and placed him on home probation subject to numerous conditions. E.W. has filed a timely notice of appeal.

The evidence presented at the jurisdictional hearing disclosed the following: On March 9, 2007, Savannah B., a high school sophomore, and five schoolmates—Sarah, Valerie, Crystal, Katie and Brianna—decided to spend the night at Katie’s house in Pacifica. Katie’s mother was not home when the girls arrived at 7:00 p.m., and several of them, including Savannah, drank multiple shots of alcohol. Several girls, but not Savannah, also smoked marijuana.

About 9:00 p.m., Katie invited Mike J., whom she was dating, and E.W. to her house. The boys did not go to the same high school as the girls and none of the girls, other than Katie had met either of them before that evening. Savannah testified that she did not discuss “hooking up” with E.W. before he arrived or at any other time. Brianna testified that during a conversation among all the girls, Savannah and Sarah discussed “somebody” “hooking up” with E.W.

E.W. and Mike arrived at Katie’s house about midnight. They and the girls went to Katie’s bedroom where some of them drank alcohol and smoked marijuana. Savannah went to the computer room and logged on to her “My Space” account. The rest of the group eventually joined her there. Katie and Mike pressured Savannah to “hook up” with E.W., but Savannah demurred and the rest of the group returned to Katie’s bedroom. About 1:00 a.m., Katie, Mike and E.W. returned to the computer room and again pressured Savannah to “hook up” with E.W. Katie and Mike insisted that they could not kiss until Savannah kissed E.W. Although Savannah testified she felt uncomfortable, she finally relented and kissed him on the cheek, but then left the room. About 10 minutes later, she returned to the computer room, where Katie and Mike continued to pressure her to “hook up” with E.W. E.W. leaned over to kiss Savannah on the lips, but she turned away and he kissed the side of her mouth.

Savannah went to Katie's bedroom to sleep. Three girls were already sleeping on Katie's bed so Savannah laid on the floor next to the bed, covered herself with a blanket, and went to sleep. She was wearing jeans, two tank tops over a bra, and a zipped sweatshirt. Savannah testified she never heard E.W., Mike, or Katie enter the bedroom. However, Sarah testified that she heard E.W. ask Savannah if he could lie down next to her, and she heard Savannah answer "Yeah."

About 4:00 a.m., Savannah was awakened when Katie yelled, "You guys have to leave because you were suppose to be out of here by 3:00. It's already after 4:00." Savannah testified that E.W. then said to her, "No. You get back to what you were doing and I'll get back to what I was doing." Savannah was lying on her back and E.W. was pressed against her side. She suddenly "noticed that [E.W.]'s hand was up my shirt underneath my bra and his hand was in my underwear. And one of his fingers was in my vagina." Her jeans were unzipped.

Savannah testified that she jumped up, asked "What are you doing?," and zipped her jeans. She was "shocked and scared." Brianna said Savannah looked "shocked." Savannah said, "I felt violated and kind of like dirty, scared." E.W. said nothing and looked away. Savannah pulled Brianna into the laundry room, and tearfully stated she had "woken up and [E.W.] had been touching her." Brianna testified that Savannah stated "that she woke up with his hands down her pants and him on top of her." Savannah was crying and shaking. Savannah also told Sarah and Katie what E.W. had done.

The two boys left in a cab. Sarah and Brianna comforted Savannah, and the girls went back to sleep. When Savannah arrived home that morning and took a shower, she testified that she felt "burning and itching" and pain in her vaginal area. She did not tell her parents because she was "scared," "felt dirty" and did not want them to think less of her. She first reported the incident to school officials and at their insistence told her parents later that week. She gave a statement to Pacifica Police Corporal Bill Glasgo, and five days after the incident submitted to a physical examination. The physical exam revealed that Savannah had several bruises and numerous small lacerations to her vaginal and genital area in the shape of "fingernail divots." The nurse who performed the

examination, a specialist in child sexual abuse examinations, testified that the cuts and bruises were consistent with forcible digital penetration and inconsistent with being self-inflicted. She also testified the injuries appeared to be about four days old. The nurse opined that Savannah was injured while she was unconscious or asleep because the cuts would have hurt. She testified that the injuries were the result of nonconsensual touching and could not have been caused by a tampon.

The defense called several witnesses, including Sarah, to testify to various details of the evening's events, but E.W. did not testify. On rebuttal, Officer Glasgo testified that he interviewed Sarah on March 13, 2007. Sarah told him that Savannah accompanied her to Katie's bedroom and passed out on the floor next to Katie's bed. She did not see E.W. in the room until they were all awakened and he stood pulling up his pants. Sarah said she saw E.W. lay back down next to Savannah and say, "Go back to what you were doing and I'll go back to what I was doing." Sarah testified that Savannah "had a scared look on her face." Savannah told her that E.W. "had put his hands down her pants and that her bra was undone when she was awakened."

During cross-examination of Glasgo, defense counsel began a question by referring to a section of Glasgo's report in which he had written, "It should be noted that during my conversation, [Sarah] thought the reason why [E.W.] came over was because [Savannah] wanted to hook up with him." The prosecutor objected on the ground that the statement was beyond the scope of direct examination and because neither attorney questioned Sarah about the statement. Sarah had testified that she did not remember having a conversation about why the boys were coming over. The court sustained the objection. Defense counsel did not recall Sarah to testify about her prior statement to Glasgo.

DISCUSSION

Cross-examination

E.W. contends the court committed prejudicial error in refusing to permit Glasgo to be cross-examined about the statement in his report that Sarah had told him she thought the reason E.W. had come to Katie's house was "because [Savannah] wanted to

hook up with him.” He argues that his defense was that Savannah consented to his physical contact with her, and the evidence that she wanted to be with him was highly probative of his defense.

Glasgo had been called as a witness during the prosecution’s case-in-chief and testified to certain statements concerning the evening’s events that Brianna had reported to him, which Brianna testified she did not remember. Sarah was called as a defense witness and she, too, testified that she did not recall many of the details of what had occurred or her prior statements concerning what had occurred in Katie’s bedroom and the computer room attributed to her in Glasgo’s report. On rebuttal, the prosecutor recalled Glasgo and brought out what Sarah had previously told him about the events that evening. On cross-examination, E.W.’s counsel first probed those matters with Glasgo without objection. When the questioning turned to what Sarah had said about why she thought E.W. had come to the house—because Savannah wanted to “hook up” with him—the prosecutor objected that such questions were beyond the scope of cross-examination because she had asked no questions on the subject, because Sarah had not been asked about such statements, and because she had been released as a witness.

What Sarah told Glasgo about why E.W. had come to the house was, in addition to being speculative, hearsay. Nonetheless, Evidence Code section 1235 provides, “Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.” Although E.W.’s attorney argued that the proffered evidence was inconsistent with Sarah’s denial of any recollection of a discussion earlier in the evening concerning “the boys coming over,” there was no necessary inconsistency. “Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness’ prior statement [citation], and the same principle governs the case of the forgetful witness.” (*People v. Green* (1971) 3 Cal.3d 981, 988; see also *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 699 [“In order that a witness’ present testimony be subject to impeachment, the prior statement must be clearly inconsistent”].) The statement that Sarah made to Glasgo

showed only that Sarah thought this could be the reason E.W. came over, which was not inconsistent with her statement that there was no discussion among the girls about the boys coming over that evening.¹

Whatever doubt there may be about the applicability of the inconsistency requirement, there is no doubt that Glasgo's proffered testimony was not offered in compliance with Evidence Code section 770. Section 770 provides, "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

[¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action." Sarah was never asked why she thought E.W. came to Katie's house, whether she had discussed with Savannah "hooking up" with E.W., or whether she had made a statement to Glasgo such as he reported in his notes. Thus, Sarah had no opportunity to deny or explain the statement that Glasgo reported. (See *People v. Abair* (1951) 102 Cal.App.2d 765, 770-771.) Moreover, when E.W.'s attorney attempted to pursue this line of questioning, Sarah had been dismissed as a witness. Therefore, the proffer satisfied neither of the alternatives specified in section 770, and no showing has been made that the interests of justice required an exception to the rule.

In short, the trial court did not err in sustaining the prosecution's objection to the proffered testimony.

Prosecutorial misconduct

E.W. also contends the prosecutor engaged in two acts of misconduct that require reversal. Both contentions are near frivolous. Initially, neither act was cited as

¹ The relevant questioning of Sarah was as follows:
"Q: Do you remember why they came . . . or who invited them?
"A: I thought that Katie invited them over.
"Q: Was there discussion earlier about the boys coming over in the evening?
"A: Not really. Katie just mentioned her friends coming. I don't remember.
"Q: So you don't recall having a discussion about it?
"A: Not really."

misconduct in the trial court and, therefore, the contentions have been waived. (*People v. Roldan* (2005) 35 Cal.4th 646, 720, disapproved on other grounds by *People v. Doolin* (Jan. 5, 2009) __ Cal.4th __ [2009 WL 18142].) Secondly, whether or not the prosecutor's acts were justified, they produced no prejudice. E.W. first criticizes the decision to charge him with attempted rape; however, this count ultimately was dismissed on the prosecutor's own motion, and could have had no adverse impact on the outcome of the proceedings. The second instance of asserted misconduct was the prosecutor objecting to the transfer of the case for the purpose of disposition to San Francisco, E.W.'s county of residence. However, despite the prosecutor's opposition, the case was transferred to San Francisco as E.W. had requested, eliminating any possibility of prejudice.²

Moreover, we do not believe that the record demonstrates any form of prosecutorial misconduct, much less misconduct that was "reprehensible" or denied E.W. a fair hearing. There was evidence tending to show that E.W. lowered his pants, unzipped Savannah's pants and climbed on top of her while she was sleeping. The court found that the evidence established beyond a reasonable doubt that E.W. engaged, and necessarily intended to engage, in digital penetration—a finding that he does not question. Certainly at the pleading stage there was probable cause and a good faith basis to believe that the evidence would demonstrate an intent to rape. That it failed to do so hardly establishes that the prosecutor was motivated by improper considerations, or that she intentionally overcharged the case. (*People v. Richardson* (2008) 43 Cal. 4th 959, 1014.) Finally, the prosecutor was straightforward in her argument seeking to retain the dispositional hearing in San Mateo County, where the offense occurred and the judge who had conducted the jurisdictional hearing was familiar with the facts of the case. She made no misrepresentations concerning the facts or the reasons for which she argued the case

² E.W.'s detention was not caused by the prosecutor's opposition to the transfer, but—whether or not the detention was necessary for this purpose—was for the very purpose of affecting the transfer that E.W. had requested.

should be retained in San Mateo County. Such advocacy is not misconduct and provides no basis for reversal.

DISPOSITION

The judgment is affirmed.

Pollak, J.

We concur:

McGuiness, P. J.

Siggins, J.